CHAPTER 12

FISCAL LAW

REFERENCES:

1. Contract & Fiscal Law Department, TJAGSA, *Fiscal Law Deskbook.*
2. The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpublished).
3. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras).
4. DoD Directive 7201.01, *Official Representation Funds* (Aug. 15, 1999).
5. Dep't of Army Reg. 37-47, *Representation Funds of the Secretary of the Army* (May 31, 1996).
6. DoD Directive 7280.4, *Commander in Chief's Initiative Fund* (Oct. 26, 1993).
7. CJCSI 7401.01A, *CINC Initiatives Fund* (Jan. 30, 1999).
8. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpublished).
9. DoD Directive 2205.2, *Humanitarian and Civic Assistance Provided in Conjunction with Military Operations* (Oct. 6, 1994).
10. DoD Instruction 2205.3, *Implementing Procedures for the Humanitarian and Civic Assistance Program* (Jan. 27, 1995).

The application of fiscal principles often appears counterintuitive. Because Congress provides appropriations for military programs, and military departments in turn allocate funds to commands, commanders may wonder why legal advisors scrutinize the fiscal aspects of mission execution so closely, even though expenditures or tasks are not prohibited specifically. Similarly, JTF staff members managing a peacekeeping operation may not appreciate readily the subtle differences between operational necessity and "mission creep"; nation building and humanitarian and civic assistance; or construction, maintenance, and repair. Deployed judge advocates often find themselves immersed in such issues. When this occurs, they must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets. To aid legal advisors in this endeavor, this chapter affords a basic, quick reference to common authorities. Because fiscal matters are so highly legislated, regulated, audited, and disputed, however, it is not a substitute for thorough research and sound application of the law to specific facts.

The principles of federal appropriations law permeate all federal activity, both within the United States, as well as overseas. Thus, there are few "contingency" exceptions to the fiscal principles discussed throughout this chapter. The statutes, regulations, case law, and policy applicable at Fort Drum, for example, likely will control operations in Bosnia, Nicaragua, or Hungary. Fiscal issues arise frequently during drug interdiction, humanitarian and civic assistance, security assistance, disaster relief, and peacekeeping operations. Failure to understand fiscal nuances may lead to the improper expenditure of funds and administrative and/or criminal sanctions against those responsible for funding violations. Moreover, early and continuous judge advocate involvement in mission planning and execution is essential. Judge Advocates who participate actively will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need.

Under the Constitution, Congress raises revenue and appropriates funds for federal agency operations and programs. *See* U.S. Const., art. I, § 8. Courts interpret this constitutional authority to mean that Executive Branch officials, e.g., commanders and staff members, must find affirmative authority for the obligation and expenditure of appropriated funds.[1] *See, e.g.,* U.S. v. MacCollom, 426 U.S. 317, at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.") Likewise, in many cases, Congress has limited the ability of the Executive to obligate and expend funds, in annual authorization or appropriations acts or in permanent legislation.

[1] An obligation arises when the government incurs a legal liability to pay for its requirements, e.g., supplies, services, or construction. For example, a contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

Legal advisors should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) DoD authorization acts; (5) DoD appropriations acts; (6) agency regulations; and (7) Comptroller General decisions. Without a clear statement of positive legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority.

BASIC FISCAL CONTROLS[2]

Congress imposes fiscal controls through three basic mechanisms. Each is implemented by one or more statutes. The U.S. Comptroller General, who heads the General Accounting Office (GAO), audits executive agency accounts regularly and scrutinizes compliance with the fund control statues and regulations. The three basic fiscal controls are:

(1) Obligations and expenditures must be for a proper purpose;

(2) Obligations must occur within the time limits applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); and

(3) Obligations must be within the amounts authorized by Congress.

The enforcement mechanism for these controls is the Antideficiency Act (ADA). *See* 31 U.S.C. § 1341(a), 1517. The ADA prohibits any government officer or employee from making or authorizing an expenditure in excess of the amount available in an appropriation; incurring an obligation in advance of an appropriation, except as authorized by law; or making or incurring obligations in excess of formal subdivisions of funds within the executive branch, or in excess of amounts prescribed by regulations governing the formal subdivisions of funds. Penalties for violations may be criminal or civil. 31 U.S.C. § 1349, 1350. Commanders must investigate suspected violations to establish responsibility and discipline violators. DoD 7000.14-R, Financial Management Regulation, Vol. 14. [*hereinafter* DoD 7000.14-R].

THE PURPOSE STATUTE—GENERALLY

Although each fiscal control is key, the "purpose" control is most likely to become an issue during military operations. The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law (permanent legislation or annual appropriations act) or be reasonably related to the purpose of an appropriation. Judge advocates should ensure, therefore, that:

(1) An expenditure fits an appropriation (or permanent statutory provision) or is for a purpose that is necessary and incident to the general purpose of an appropriation.

(2) The expenditure is not prohibited by law.

(3) The expenditure is not provided for otherwise, i.e., it does not fall within the scope of some other appropriation.

See, e.g., The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II] (concluding that the Purpose Statute applies to OCONUS military exercises); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954).

Augmentation of Appropriations and Miscellaneous Receipts

A corollary to the Purpose control is the prohibition against augmentation. *See* Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used for another

[2] For a more in-depth review of fiscal law issues, *See,* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK, current edition. Available at: http://jagcnet.army.mil/ContractLaw, (registration & password required) and http://www.jagcnet.army.mil/TJAGSA. (No password or registration required.)

purpose for which Congress has appropriated other funds. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund. *See*, Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

Thus, if an agency retains funds from a source outside the normal fund distribution process, an augmentation occurs and the Miscellaneous Receipts Statute is violated. *See* 31 U.S.C. § 3302(b); s*ee also* Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. *See* Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988).

There are, however, several statutory exceptions to the augmentation prohibition. For example, DoD may expend O&M funds for humanitarian assistance efforts that complement (but do not duplicate) activities funded by the appropriations of other agencies, such as the State Department. *See* 10 U.S.C. § 401.

There also are intra- and intergovernmental acquisition authorities that allow augmentation or retention of funds from other sources. *See, e.g.*, Economy Act, 31 U.S.C. § 1535; Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); 22 U.S.C. § 2318 (emergency Presidential draw down authority). The Economy Act authorizes a federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services. *See* Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); Obligation of Funds Under Mil. Interdep'tal Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); s*ee also* DoD 7000.14-R, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DoD). Consult agency regulations for order approval requirements. *See, e.g.*, Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; Army Federal Acquisition Regulation Supplement Subpart 17.5. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEAs) in counterdrug operations. *See* Chapter 19 for a more complete review. Support to CLEAs is reimbursable unless it occurs during normal training and results in DoD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 U.S.C. § 377. Another statutory provision authorizes operations or training to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* §1004 of the 1991 Defense Authorization Act, codified at 10 U.S.C. § 374, note. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

Other statutes that permit DoD to accomplish missions assigned primarily to other executive departments ("non-traditional DoD missions") include: 10 U.S.C. § 402 (transportation of humanitarian supplies), 10 U.S.C. § 404 (foreign disaster or refugee relief), and 10 U.S.C. § 2551 (other humanitarian support). These purposes also are met through foreign assistance appropriations, which are generally administered by the State Department. *See* Chapter 14 for further discussion of these authorities.

DoD Appropriations and Their Purposes

Operation & Maintenance (O&M) Appropriations. These appropriations are for day-to-day expenses of DoD components in garrison and during exercises, deployments, and military operations. Commands may use O&M appropriations for all "necessary and incident" operational expenses. They are subject, however, to specific statutory limitations. For example, end items costing $100,000 or more, or which are centrally managed, may not be purchased with these funds. *See* DoD 7000.14-R, vol. 2A, ch. 1, para. 0102; and DFAS Manual 37-100-XX (XX= current FY). Additionally, exercise-related construction of permanent facilities during exercises coordinated or directed by the Joint Chiefs of Staff outside the United States, or any construction in excess of $500,000, may not be funded with O&M appropriations. *See* 10 U.S.C. § 2805; *but see* Military Construction (MILCON) -- A Special Problem Area, *infra*,

(discussing expanded use of O&M for construction necessary to meet temporary operational needs during combat or declared contingencies).

Military Construction (MILCON) Appropriations. Congress scrutinizes military construction closely. In fact, 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements of public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Thus, construction projects in excess of $1.5 million require specific approval by Congress. While not requiring specific "line-item" approval, projects between $500,000 and $1.5 million are limited to amounts provided in the Unspecified Minor Military Construction (UMMC) appropriations within the MILCON appropriation.

Procurement Appropriations. These appropriations fund purchases of investment end items (or systems) that cost $100,000 or more and items that are centrally managed, regardless of cost.

Additional Appropriations. DoD has available to it other appropriations and support authorities. These include funds and authority under the Foreign Assistance Act (FAA), the Acquisition and Cross-Servicing statute, and the Overseas Humanitarian, Disaster, and Civic Aid appropriations. These are detailed below.

THE PURPOSE STATUTE—SPECIFIC MILITARY OPERATIONAL ISSUES

Judge advocates enhance mission success by guiding the staff and commander to the appropriate fiscal authority. The following method of analysis will help the attorney, operator, comptroller, and logistician formulate a course of action for the commander:

(1) Determine the commander's intent;

(2) Define the mission (both the organization's assigned mission and the specific task to be performed);

(3) Divide it into discrete parts (specified and implied tasks);

(4) Find legislative or regulatory authority and determine the proper fund type;

(5) Articulate a sound rationale for the specific expenditures; and

(6) Seek approval/guidance from higher headquarters, if necessary.

On occasion, it may be necessary to review an appropriation or permanent statutory provision to determine Congressional intent. For proposed expenditures that are non-routine or unique in nature, a clear, written rationale explaining why the use of funds is proper is essential. Again, if the issues are particularly problematic, seek assistance from higher headquarters.

O&M Appropriations—Use During Deployments and Contingency Operations

Deploying units normally use "generic" O&M funds to support their operations. Operation and maintenance appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. Examples of O&M expenses include force protection measures, sustainment costs, and repair of main supply routes. Likewise, expenses that are "necessary and incident" to an assigned military mission (e.g., costs of maintaining public order and emergency health and safety requirements of the populace in Haiti during the NCA-directed mission of establishing a secure and stable environment). Beware of "mission creep," however. Where the military mission departs from security, combat, or combat-related activity, and begins to intersect other agencies' authority/appropriations, the expenditure bears close scrutiny by the judge advocate. For example, commanders must have special authorization before engaging in "nation-building" activities or recurring refugee assistance. These activities normally fall within the category of foreign assistance functions administered by the State Department or U.S. Agency for International Development (USAID).

Congress also appropriates funds to be used only for specific purposes. For example, the O&M title of the appropriations act includes funding for humanitarian assistance authorized under various Title 10 provisions. *See, e.g.*, Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. at 656 (2000) (providing $55.9 million for Overseas Humanitarian, Disaster, and Civic Aid available during FYs 2001-2002). Such earmarked appropriations require separate fiscal accounting. Generally, DoD may not use generic O&M appropriations for the same purposes as funds earmarked for specific purposes within an appropriations act. For example, a commander would not use generic O&M to purchase a memento or gift for the mayor of Tuzla. Official representation funds, however, would be available for this purpose. *See* following discussion and regulations cited.

Emergency and Extraordinary (E&E) Expenses Funds (10 U.S.C. § 127) are special funds within the O&M appropriation. The secretaries of the military departments and the SECDEF may expend these funds without regard to other provisions of law. These funds are very limited in amount, however, and regulatory controls apply to prevent abuse, including congressional notification requirements for expenditures over $500,000. *See* DoD Dir. 7201.01, OFFICIAL REPRESENTATIONAL FUNDS (Aug. 15 1999); DEPT OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, (May 31, 1996); and, DEPT OF ARMY, REG. 195-4, USE OF CONTINGENCY LIMITATION .0015 FUNDS FOR CRIMINAL INVESTIGATIVE ACTIVITIES (15 APR 1983). Note: The Army's Deputy General Counsel, Ethics and Fiscal, has opined that "generic" O&M funds are available to acquire weapons from indigenous or opposing forces under a cash-for-weapons program. Thus, commanders need not expend E&E funds for this purpose.

Contingency Operations Funding Authority 10 U.S.C. § 127(a) (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)). This authority applies to deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed $50M, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100M. Does *not* apply to operations with incremental costs not expected to exceed $10M. The authority provides for the waiver of Working Capital Fund (WCF) Reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SECDEF authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.) The statute authorizes SECDEF to transfer up to $200M in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred. Statute contains provisions for both Congressional notification & GAO compliance reviews.

Section 8070 Notification. DoD Appropriations Act for FY 2001, Pub. L. No. 106-259, § 8070 (2000). Requires DoD to notify the Congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See also,* DoD Appropriations Act for FY 96, Pub. L. 104-61 § 8117 (1995). The notice required includes: a description of the articles or services to be transferred; the value of the articles or services; and with respect to a proposed transfer of supplies and equipment, a statement of whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126) which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations,* such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995). In "acquiescing" in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

CINC Initiative Funds (CIF) (10 U.S.C. § 166a) are O&M funds available for special training, humanitarian and civic assistance, incremental costs of third country participation in a combined exercise, and operations that are unforeseen contingency requirements critical to CINC joint warfighting readiness and national security interests. *See* CJCSI 7401.01A (30 Jan 1999) (detailing procedures for CJCS approval of these expenditures). The CINCs also receive O&M

funding through the service component commands for "Traditional CINC Activities" (TCA), like military-to-military contacts, combined training, and regional conferences. *See also* discussion in Chapter 14 on CIF and TCA.

Military Construction (MILCON) -- A Special Problem Area.

Military construction, as defined in 10 U.S.C. § 2801 and AR 415-15, includes any construction, development, conversion, or extension carried out with respect to a military installation. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. Military construction includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. *See* The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds). As defined further in AR 415-15, Glossary, sec. II, Terms, construction includes:

(1) The erection, installation, or assembly of a new facility.

(2) Change to a real property facility, such as addition, expansion, or extension of the facility, which adds to its overall external dimensions.

(3) Acquisition of a "existing facility," or work on an existing facility that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility. This includes installation of equipment made a part of the existing facility.

(4) Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility.

(5) Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair.

(6) Relocation of a facility from one installation to another and from one site to another.

Construction also includes the cost of installed equipment made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements.

Maintenance and Repair Are Not Construction.

Maintenance is recurring work to prevent deterioration; i.e., work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Public Works, Glossary, Sec. II, Terms (15 April 1997).

Repair is restoration of a facility, so it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. When repairing a facility, its components may be repaired by replacement, and the replacement can be up to current standards or codes. *See* Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997). The Army requires that a facility or component of a facility be in a "failed or failing" condition to qualify as a repair project. See Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997).

When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction. AR 420-10, Glossary, Sec. II, Terms.

Construction Using O&M Funds.

Deployed commands normally receive only O&M-type funds. (In this context, the O&M may be from a humanitarian or foreign disaster assistance appropriation, but it is used as a generic O&M fund would be, i.e., to conduct the specified operation.)

(1) 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to $500,000 per project. Thus, as a matter of DoD policy, commanders must use O&M for these undertakings. *See* AR 415-15 (4 Sep. 1998); DA Pam 420-11 (7 Oct 1994). Again, however, an exception to this rule is that commanders must use MMC funds, not O&M, for all permanent construction during OCONUS CJCS exercises. *See* 10 U.S.C. § 2805(c)(2). DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise, and the cost of the construction is expected to exceed $100,000. *See* Military Construction Appropriation Act, 2001, Pub. L. No. 106-246, § 113, 114 Stat. 511 (2000).

(2) Only funded costs count against the $500,000 O&M threshold. Funded costs are the "out-of-pocket" expenses of a project, such as contract costs, TDY costs, materials, etc. It does not include the salaries of military personnel, equipment depreciation, and similar "sunk" costs. The cost of fuel used to operate equipment is a funded cost. Segregable maintenance and repair costs are not funded costs. *See* DA Pam 420-11, Glossary.

Methodology for analyzing minor construction issues:

- Define the scope of the project;
- Classify the work as construction, repair, or maintenance;
- Determine the funded cost of the project; and
- Select the proper appropriation.

Construction Using O&M Funds During Combat or Declared Contingency Operations.

Per Army policy, use of O&M funds in excess of the $500,000 threshold discussed above is proper when erecting structures/facilities during combat or contingency operations declared per 10 U.S.C. § 101(a)(13)(A). *See*, Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applies only if the construction is intended to meet a temporary operational need that facilitates combat or contingency operations. The basis for this opinion is that O&M funds are the primary funding source supporting contingency or combat operations; therefore, if a unit is fulfilling legitimate requirements necessitated only by those operations, then O&M appropriations are proper. *See* TJAGSA Practice Notes, *Contract Law Note: Funding Issues in Operational Settings*, ARMY LAW., Oct. 1993, at 38. Whether combat or contingency operation construction is "temporary" depends on the duration and purpose of a facility's use by U.S. forces, not on the materials used in the construction. Coordinate with higher headquarters before relying on the "temporary operational need" justification.

The Unspecified Minor MILCON Program. Normal construction funding rules apply when the aforementioned conditions are not met, including the funding of construction for which the United States would have a follow-on or contingency use after the termination of military operations necessitating the construction. Thus, assuming the funded costs of a construction project exceed $500,000, commanders must seek special funding and approval to proceed. One alternative is to obtain Unspecified Minor Military Construction (UMMC) funds. Under this program, Congress funds minor military construction projects with estimated costs between $500,000 and $1.5 million (up to $3 million if the project is intended to correct a deficiency that is life, health, or safety threatening).

Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. *See* 10 U.S.C. § 2805(c)(2). The authority for exercise-related construction is limited to no more than $5 million per military department per fiscal year. 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. Units may use O&M funds for these temporary requirements. Again, however, congressional notification is required for any construction in excess of $100,000. *See* Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999).

Examples.

1. An Army unit deploys to central Europe at the request of a newly-elected democratic government and uses a former Soviet installation as a base. A large multi-story barracks facility is proposed for conversion to an administration facility. The Division Engineer advises the work will include: (a) replacing the roof, the flooring, several interior walls, and the heating system ($1.1 million); (b) repairing numerous other failing components of the building ($450,000); (c) installing new air-conditioning ($150,000); and (d) constructing new walls to accommodate the new configuration ($100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be $1.8 million. Because the air-conditioner and new walls will cost only $250,000, the Division Engineer contends that the entire project can be approved locally and funded with O&M. Is the Division Engineer right? No. A conversion is construction by definition. All work is required for the conversion of this building to an administrative facility, so it must all be funded as construction (use MILCON money because the cost exceeds $1.5 million). If U.S. forces were to continue using the facility as a barracks, then the air-conditioning and new walls could be segregated from the other (repair) efforts, and all work could be funded with O&M money. [Note: Although the repair work may be physically divisible from the conversion, consider the repair costs in this case to be "funded" costs of the conversion project if the repair work would not have been done, but for the need for the conversion.]

2. The road to the same unit's fuel supply point needs immediate repair. The division's optempo increased substantially in the past few weeks, so the road has been used more and by vehicles heavier than it was designed to handle. Delivery trucks used by the fuel supplier have been breaking up the road. The Division Engineer believes that, in addition to filling potholes, two inches of asphalt must be added to support the increased and heavier traffic. The sustainment contractor estimates costs of $530,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds may be used. Is the Engineer correct? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than $500,000 (if the potholes cost more than $30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction. Likewise, use of O&M funds would be proper for the entire project if the work was necessary to meet a temporary operational need during combat or declared contingency operations. *See* **Construction Using O&M Funds During Combat or Declared Contingency Operations**, above.

Emergency Construction Authority.

Upon a presidential declaration of national emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with any unobligated military construction and family housing appropriations. On 14 November 1990, President Bush invoked this authority in support of Operation Desert Shield. *See* Executive Order 12734, Nov. 14, 1990, 55 Fed. Reg. 48099. Other emergency construction authorities available under existing law include:

Emergency Construction, 10 U.S.C. § 2803. Limitations: (1) determination that project is vital to national defense; (2) a 21-day congressional notice and wait period; (3) $30 million cap per fiscal year; and (4) funds must come from reprogrammed, unobligated military construction appropriations.

Contingency Construction, 10 U.S.C. § 2804. Limitations similar to those under 10 U.S.C. § 2803 apply.

Contacts and Exercises with Foreign Militaries

Congress has provided ample authority for bilateral and multilateral contacts with foreign militaries. These authorities are the heart of the current Partnership for Peace (PFP) program, as well as many other joint training, military-to-military contact, and exercise programs. These authorities fund U.S. costs of preparing and conducting combined training, as well as paying selected incremental costs for our training partners. [*See also* Chapter 14, Security Assistance]

Bilateral and Multilateral Contacts.

5 U.S.C. § 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412 (Travel). Travel to conferences and site visits are supported with a variety of statutory authorities.[3] U.S. civilian employees and military personnel are authorized to expend U.S. funds under the Joint Travel Regulations (JTR), para. C.6000.3; individuals performing services for the government may also be funded.

10 U.S.C. § 1050 (Latin American Cooperation - LATAM COOP) authorizes service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

10 U.S.C. § 1051 (Bilateral or Regional Cooperation Programs) provides similar authority to pay travel expenses and other costs associated with attendance at bilateral or regional conferences, seminars, or similar meetings if the SECDEF deems attendance in the U.S. national security interest. *See also* DoD Authorization Act for FY 97, Pub. L. No. 104-201 (110 Stat. 3009), § 1065 and §8121 (1996), authorizing support for participation in Marshall Center activities for European and Eurasian nations, and attendance by foreign military officers and civilians at seminars and similar studies at the Asia-Pacific Center for Security Studies, respectively.

10 U.S.C. § 168 (Military-to-Military Contacts) authorizes the SECDEF to engage in military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

Funding - All of these activities are funded with O&M funds [often with service funding, TCA, or CIF, as described above].

Bilateral and Multilateral Exercise Programs.

10 U.S.C. § 2010 (Developing Country Exercise Program - DCCEP) authorizes payment of incremental expenses of a developing country incurred during bilateral or multilateral exercises if it enhances U.S. security interests and is essential to achieving the fundamental objectives of the exercise.

10 U.S.C. § 2011 (Special Operations Force - SOF Training) permits the SOCOM Commander or Combatant CINC to fund the expenses of training all Special Operations Forces [Civil Affairs, PSYOP, Special Forces, SEALS, Rangers, Special Boat Units, AFSOC, etc.] training with the armed forces or security forces of a friendly foreign country, including incremental expenses.

Incremental expenses incurred as the result of these training authorities include rations, fuel, training aids, ammunition, and transportation; they do not include pay, allowances, and other normal costs for the country's personnel.

Regional Cooperation Programs.

Partnership for Peace activities are authorized by existing authorities, outlined above.[4]

Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU). This legislation funds various programs to dismantle the FSU's arsenal of weapons of mass destruction;[5] Congress appropriated $440.4M for the CTR program in FY 99.[6] These are three-year funds available until 30 September 2001.

[3] 31 U.S.C. § 1345 requires a specific appropriation for travel, transportation, and subsistence expenses for meetings. *See also* National Highway Traffic Safety Admin.—Travel and Lodging Expenses, 62 Comp. Gen. 531 (1983).

[4] *See* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994)

[5] Defense Authorization Act for FY 99, Pub. L. No. 105-261, 112 Stat. 2161, § 1301 (1998). *But see* Authorization Act, § 1303 (prohibiting use of funds for peacekeeping or peacekeeping-related activity, housing, environmental restoration, or job training).

[6] Defense Appropriations Act for FY 99, Pub. L. No. 105-262, 112 Stat. 2286 (1998).

International Military Education and Training (IMET) - [Foreign Assistance Act (FAA) §§ 541-545 (22 U.S.C. §§ 2347-2347d)] is a security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights [often called **Expanded-IMET**].

Overseas Humanitarian, Disaster, and Civic Aid (OHDCA) Operations *See* Chapter 14

Congress has provided limited authority to DoD to conduct Overseas Humanitarian, Disaster, and Civic Aid (OHDCA) operations [also known as Humanitarian Assistance Programs (HAP)]. *See* DoD Appropriations Act, 2001, Pub. L. No. 106-259, Title II, 114 Stat. 663 (2001) (providing $55.9M for all programs conducted under the authority of 10 U.S.C. §§ 401, 402, 404, 2547, and 2551 during FYs 2001 and 2002).

Primary responsibility for Humanitarian, Refugee. and Disaster Relief operations lies with the Department of State, through USAID and other agencies, like the Office of Foreign Disaster Assistance (OFDA).

FAA §492(10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See* Foreign Assistance Appropriations Act for FY 98, Pub. L. 1054-118, Title II, 111 Stat. 2391 (1997) ($190M appropriated to DoS for international disaster assistance under this authority).

FAA § 506(a)(1) (22 U.S.C. § 2318(a)(1))(Emergency Drawdown) permits the President to draw down defense stocks and services in response to unforeseen emergencies requiring military assistance to a foreign country or international organization. Use of this authority requires notice to Congress, and is limited to $100 million per fiscal year. Contracting is not allowed under Drawdown authority, with the exception of transportation, when less expensive than military transportation. *See*, 22 U.S.C. § 2318(c). The Defense Security Cooperation Agency has proponency for Drawdowns. *See* http://www.dsca.osd.mil/. For a good "nuts & bolts" guide to drawdowns see, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA) Drawdown of Defense Articles and Services, (as of 15 Dec. 2000), available at: http://129.48.104.198/programs/erasa/Drawdown%20handbookr1.pdf.

FAA § 506(a)(2) (22 U.S.C. § 2318(a)(2))(Emergency Drawdown). The President also may require any federal agency to provide support to counterdrug activities, disaster relief, or migrant and refugee assistance, antiterrorism, and non-proliferation assistance efforts of other federal agencies through a FAA § 506 drawdown, up to $200M per year. 506(a)(2). Drawdowns for counterdrug activities and POW accounting are limited to $75M and $15M, respectively, and DoD provides no more than $75M of goods and services per year under this authority.

Refugee Assistance (22 U.S.C. 2601c). The Department of State is responsible for refugee support in the Migration and Refugee Assistance Act of 1962. *See* Foreign Assistance Appropriations Act for FY 98, Pub. L. 105-118, Title II, 111 Stat. 2386 (1997) ($650M appropriated to DoS to support refugee operations, the International Organization for Migration (IOM), the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees (UNHCR); as well as $50M of no-year money to support the Emergency Refugee and Migration Assistance Fund). (*See also* provisions of the Refugee Assistance Act of 1980, § 501 (8 U.S.C. § 1522 note), authorizing the President to direct other agencies to support Cuban and Haitian Refugees on a reimbursable or non-reimbursable basis).

FAA § 632 (22 U.S.C. § 2392)(DoS Reimbursement). Under this authority, similar to the Economy Act, discussed below, DoS may provide funds to other executive departments to assist DoS in accomplishing their assigned missions (usually implemented through "632 Agreements" between DoD and DoS).

Fiscal Law Issues in Honduras. Historically, DoD conducted limited Humanitarian and Civic Assistance (HCA) operations in foreign nations without separate statutory authority. In 1984, the Comptroller General opined that DoD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. § 1301(a)) and other well-established fiscal principles. *See* To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (Honduras I). The Comptroller General concluded that DoD had used its O&M accounts improperly to fund foreign aid and security assistance. The Honduras I opinion applied a three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

> First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made . . . . Second, the expenditure must not be prohibited by law . . . . Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. Honduras I at 427-28.

This test is used to analyze fiscal law problems. Applying it to the military construction, training, and HCA operations conducted in Honduras in 1983, the Comptroller General disapproved certain O&M expenditures that were reasonably related to DoD purposes (that is, expenditures which achieved "readiness and operational benefit" for DoD), but which failed the other tests. The Comptroller General determined that certain O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives that were within the scope of more specific appropriations, such as appropriations to the State Department for foreign aid under the FAA or the Arms Export Control Act (violating the third prong). *See* The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) (Honduras II) at 27-30. The Comptroller General did recognize, however, that limited HCA was permissible with O&M funds. *See* Honduras II at 38. *See also* 10 U.S.C. § 401c(4) and DoD Dir. 2205.2, Humanitarian and Civic Assistance. This controversy spurred the development of separate legislative authority (discussed below) for the conduct of humanitarian activities by the military.

DoD Statutory Authorities. (*See* Chapter 14*, this Handbook*).

10 U.S.C. § 401 (HCA) provides for HCA projects, approved in coordination with the Combatant CINCs and DoS, that improve operational readiness skills of participating U.S. forces and are conducted in conjunction with military operations. HCA projects are often conducted during CJCS-directed exercises or deployments for training. Section 401 includes authority for training host nations in the removal of land mines. *See* 10 U.S.C. § 401(e)(5).

10 U.S.C. § 402 (Transportation). DoD may transport supplies provided by non-governmental, U.S. sources without charge on a space-available basis. DoD may not use this authority to supply a military or paramilitary group. Administrative details for the use of the § 402 authority may be found at: http://public.transcom.mil/J3/denton/steps.html.

10 U.S.C. §404 (Foreign Disaster Assistance). The President may direct SECDEF to provide disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent the loss of life. Includes transportation, supplies, services, and equipment; but requires notice to Congress within 48 hours. OHDCA funds are available for organizing general policies and programs for disaster relief programs. The President delegated disaster relief authority to the SECDEF, with concurrence from DoS (except in emergency situations). *See* EO 12966, 60 Fed. Reg. 36949 (15 July 1995).

10 U.S.C. § 2547 (Excess Nonlethal Supplies: Humanitarian Relief) authorizes excess supplies to be made available for humanitarian relief to DoS, which will be responsible for distribution. May be used in conjunction with other authorities to provide transportation or § 2551 authority for funding incidental costs.

10 U.S.C. § 2551(Transportation and Other Humanitarian Support). DoD also may provide fully funded transportation (on an other-than space-available basis), if it pays such transportation costs with its O&M funds earmarked for OHDCA purposes. In addition, this statute permits the use of funds for "other humanitarian purposes, worldwide," including contracts if necessary.

The Judge Advocate's Role. The judge advocate's primary role during military operations that involve disaster relief, humanitarian, or refugee support operations is to ensure mission accomplishment within the constraints of law. It requires an in-depth understanding of the statutory authorities. The general rule is that only O&M funds earmarked for OHDCA purposes are used for this support. Secondary sources of authority include 10 U.S.C. § 127a Contingency Funds; § 166a CINC Initiative Funds (CIF); and Traditional CINC Activity funding (TCA). The judge advocate must ensure that problems are identified during exercise planning and avoided. After-the-fact justifications that stretch DoD authority risk Comptroller General scrutiny and adverse actions against those who circumvent congressionally-imposed limitations.

Supporting Multilateral Peace and Humanitarian Operations

U.S. support to other nations or international organizations during multilateral operations is authorized by a number of provisions of the Foreign Assistance Act, Title 10 U.S.C., the Arms Export Control Act, and other statutes. With respect to UN support, Presidential Decision Directive (PDD)-25 emphasizes the necessity for reducing costs for UN peace operations, reforming UN management of peace operations, and improving U.S. management and funding of peace operations (including increased cooperation between the Legislative and Executive branches). The United States generally will seek either direct reimbursement for the provision of goods and services to other nations or international organizations, or credit against a UN assessment. In rare circumstances, the United States may contribute goods, services, and funds on a nonreimbursable basis. DoS is responsible for oversight and management of Chapter VI operations where U.S. combat units are not participating, as well as Chapter VI operations in which U.S. forces are participating and all Chapter VII operations.

Authorities. Much like Disaster Relief and Refugee Support, DoS has the lead in supporting other nations engaged in Peacekeeping Operations (PKO). *See* FAA § 551 (22 U.S.C. § 2348). *See also* Foreign Operations Appropriations Act for FY 97 (additional appropriations), Title V, Chapter 7, *reprinted in* H.R. Rep. 863, 104th Cong., 2d Sess. 536 (1996) (DoS provided $65M to support PKO). Other than the authorities mentioned below, DoD is prohibited from providing direct or indirect contributions to the UN for peacekeeping operations or to pay UN arrearages. 10 U.S.C. § 405. In addition, under § 8074 of the Defense Appropriations Act for FY 99, Pub. L. No. 105-262 (1998), DoD also must notify Congress 15 days before transferring to another nation or international organization any defense articles or services in connection with peace operations under Chapter VI or VII of the UN Charter or any other international peacekeeping, peace enforcement, or humanitarian assistance operation. This requirement affects all of the authorities described in this section, or the preceding section, unless they already require congressional notification. In practice, DoD provides blanket notification for all PKO or Humanitarian operations where goods or services are being transferred to other nations or international organizations.

UN Participation Act (UNPA) § 7 (22 U.S.C. § 287d-1) authorizes support to the UN, upon its request, to assist in the peaceful settlement of disputes (not involving the employment of armed forces under Chapter VII). Includes detail of up to 1000 military personnel as observers, guards, or any other non-combatant capacity, and furnishing of facilities, services, or other assistance and loan of U.S. supplies and equipment. The statute generally requires reimbursement, except when it has been waived in the national interest (authority delegated to DoS by EO 10206, 16 Fed. Reg. 529 (1951)).

FAA § 506(a)(1&2) (22 U.S.C. § 2318(a)(1&2)) (Emergency Drawdown). With the limitations discussed above, these drawdowns also may be used to support multilateral peace and humanitarian operations.

FAA § 552(c)(2) (22 U.S.C. § 2348(c)(2)) (PKO Drawdown). A FAA § 552 drawdown, of up to $25M per year from any federal agency, may be used to support peace operations in "unforeseen emergencies, when deemed important to the national interest."

Detailing of Personnel. FAA § 627 (22 U.S.C. § 2387) authorizes detailing of officers or employees to foreign governments, when the President determines it furthers the purposes of the FAA. FAA § 628 (22 U.S.C. § 2388) allows similar details to international organizations, to serve on their staff or to provide technical, scientific, or professional advice or services. Per § 630 of the FAA (22 U.S.C. § 2390), detailed individuals may not take an oath of allegiance or accept compensation. 22 U.S.C. § 1451 authorizes the Director of the U.S. Information Agency (USIA) to assign U.S. employees to provide scientific, technical, or professional advice to other countries. This does not authorize details related to the organization, training, operations, development, or combat equipment of a country's armed forces. 10 U.S.C. § 712 authorizes the President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America. All of these details may be on a reimbursable or a non-reimbursable basis.

FAA § 516 (22 U.S.C. § 2321j) (Excess Defense Articles). Defense articles no longer needed may be made available to support any country for which receipt of grant aid was authorized in the Congressional Presentations Document (CPD). Priority is still accorded to NATO and southern-flank allies. There is an aggregate ceiling of $350M per year, beginning in FY 97; cost is determined using the depreciated value of the article. No space available transportation is authorized, normally; but DoD may pay packing, crating, handling and transportation costs to PFP eligible nations under the Support to Eastern European Democracy (SEED) Act of 1989. *See* Defense Security Assistance and Improvements Act, § 105, Pub. L. No. 104-164 (1996).

Reimbursable Support. The primary authority for reimbursable support is FAA § 607 (22 U.S.C. § 2357), which authorizes any federal agency to provide commodities and services to friendly countries and international organizations on an advance of funds or reimbursable basis. Support to the UN and other foreign nations are usually provided under the terms of a "607 Agreement" with the nation or organization, detailing the procedures for obtaining such support. DoS must authorize DoD to negotiate these agreements. FAA § 632, authorizing transfer of funds from DoS and the Economy Act are also means of providing reimbursable DoD support. Finally, Foreign Military Sales (FMS) or Leases, provided under authority of the Arms Export Control Act (AECA) §§ 21-22 & 61-62 (22 U.S.C. §§ 2761-62 & 2796), respectively, permit the negotiation of FMS contracts or lease agreements to support countries or international organizations. Reimbursement usually includes administrative overhead under Defense Security Cooperation Agency (DSCA) procedures.

10 U.S.C. §§ 2341-2350 (Acquisition and Cross-Servicing Agreements (ACSAs)). These statutory provisions allow DoD to acquire logistic support without resort to commercial contracting or FMS procedures and to transfer support outside of the AECA. After consultation with DoS, DoD may execute agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international or regional organizations for the reciprocal provision of logistic support, supplies, and services. Acquisition and transfers are on a cash reimbursement, replacement-in-kind, or exchange-of-equal-value basis. Many ACSAs already exist. Consult your MACOM or CINC legal advisors for details.

Security Assistance.

Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Except as authorized under the acquisition and cross-servicing authority, transfers of defense items and services to foreign countries are regulated by the Arms Export Control Act. 22 U.S.C. §§ 2751-96. *See also* DoD 7000.14-R (Financial Management Regulation), vol. 15, Security Assistance Policy and Procedures (Mar. 18, 1993). Providing weapons, training, supplies, and other services to foreign countries must be done under the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws.

The Arms Export Control Act.

The Arms Export Control Act permits DoD and commercial sources to provide defense articles and defense services to foreign countries to enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. State Department appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DoD appropriations) to foreign countries, the State Department first obtains them from the DoD. The Defense Security Cooperation Agency (DSCA) manages the process of procuring and transferring defense articles and services to foreign countries for the State Department. This process provides for reimbursement of applicable DoD accounts from State Department funds or from funds received from sales agreements directly with the foreign countries.

The reimbursement standards for defense articles and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are: not less than [the] actual value [of the article], or the estimated cost of replacement of the article, including the contract or production costs less any depreciation in the value of such article.

For defense services the reimbursement standards are: [f]ull cost to the U.S. Government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] additional costs incurred by the U.S. Government in furnishing such assistance.

Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DoD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

The Foreign Assistance Act (FAA).

The FAA has two principal parts. Part I provides for foreign assistance to developing nations; Part II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security. *See* 22 U.S.C. § 2301. The purposes served by the provision of defenses articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2302), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Part I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below)). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

State Department reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential draw down authority (22 U.S.C. § 2318), reimbursement to any government agency supporting State Department objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

> [a]n amount equal to the value [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, plus expenses arising from or incident to operations under [Part II] [salaries of military personnel and certain other costs excepted].

This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act (see below). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

The emergency presidential draw down authority of 22 U.S.C. § 2318 authorizes the President to direct DoD support for various State Department efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)). In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k. A draw down of DoD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. When no appropriation is forthcoming, a Presidential draw down is another example of an authorized augmentation of accounts (DoD appropriations are used to achieve an objective ordinarily funded from State Department appropriations).

In addition to the above, Congress has authorized another form of DoD contribution to the State Department's counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its "additional costs" in providing the services (i.e., its costs over and above its normal operating costs), not its full costs.

The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other federal agency supports State Department foreign assistance (not military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

Note the specific reference to DoD services in support of State Department counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 2120 (1998) (extending DoD's counterdrug authority through FY 2003).

The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General), ch. 7 (International Narcotics Control Program). When DoD provides services in support of State Department counterdrug activities, the regulation permits "no cost" recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. *See, e.g.,* 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

Domestic Disaster Relief Operations. *See* the chapter on Domestic Operations, this Handbook.

DoD Directive 3025.1 (Use of Military Resources during Peacetime Emergencies within the United States, its Territories, and Possessions) and AR 500-60 (Disaster Relief) regulate emergency disaster relief operations within the U.S. In 1989, Congress created the Defense Emergency Response Fund (DERF), funded with $100 million, to remain available until expended, to reimburse current appropriations used for supplies and services in anticipation of requests from other agencies for disaster assistance. Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title V, 103 Stat. 1112, 1126-27 (1989). The DERF legislation permits DoD to use DERF funds if the Secretary of Defense determines that immediate action is necessary before receipt of a formal request for assistance on a reimbursable basis from another federal agency or a state government. In 1993, Congress expanded DoD's ability to use DERF funds, to make this appropriation available after a request for assistance from another federal agency or a state government, if the Secretary of Defense determines that use of the fund is necessary. Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131, 107 Stat. 1418, 1470 (1993). This change makes DERF funds available for DoD domestic disaster assistance efforts after a request for assistance, and avoids DoD jeopardizing its O&M accounts by providing disaster assistance in the absence of a reimbursement agreement. However, DoD activities should continue to obtain reimbursement agreements as emergency conditions permit, rather than relying on DERF funding exclusively.

The Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121-5203) authorizes the President to direct federal agencies to provide assistance essential to meeting immediate threats to life or property resulting from a major disaster, with or without reimbursement. 42 U.S.C. §§ 5170a & 5170b. Agencies may incur obligations immediately by contract or otherwise in such amounts as are made available by the President. 42 U.S.C. § 5149(b). Federal agencies may receive reimbursement for their relief efforts if the Federal Emergency Management Agency (FEMA) requests assistance. Reimbursement is limited to expenses above normal operating levels. Agencies may credit reimbursements received to their operating accounts. 10 U.S.C. § 5147; AR 500-60, paragraph 5-3. A Memorandum of Understanding between DoD and FEMA should address reimbursements. DoD activities also should seek a FEMA tasking letter defining the exact scope of disaster relief responsibilities. The letter should state a not-to-exceed reimbursable amount, which DoD units should not exceed without approval from higher headquarters.

Purpose Statute Violations

As noted at the beginning of this chapter, the Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *See* 31 U.S.C. . §• 1301(a). Thus, if the command uses funds for an improper purpose, it must recover/deobligate the funds used erroneously and seek the proper appropriation. For example, if the command constructs a $550,000 (funded costs) building with O&M funds, it has violated the Purpose Statute. (Remember, O&M is normally proper only for projects with funded costs up to $500,000.) To correct this violation, the command must recover the O&M funds and substitute (obligate) Unspecified Minor Military Construction (UMMC) funds, which are available for projects between $500,000 and $1.5 million. While this is a matter of adjusting agency accounts, if proper funds (UMMC) were unavailable both at the time of the original obligation, e.g., contract award, and when the adjustment is made, the command must report a potential Antideficiency Act (ADA) violation. *See* discussion of the ADA, below. The same analysis applies if the command uses O&M funds to purchase what are considered to be investment items, e.g., equipment or systems that are either centrally managed or cost $100,000 or more. Finally, if a command uses funds for a purpose for which there is no appropriation, this is an uncorrectable Purpose Statute violation, and officials must report a potential ADA violation.

AVAILABILITY OF APPROPRIATIONS AS TO TIME

The "Time" control includes two major elements. First, appropriations have a definite life span. Second, appropriations normally must be used for the needs that arise during their period of availability.

Period of availability. Most appropriations are available for a finite period. For example, Operation and Maintenance funds, the appropriation most prevalent in an operational setting, are available for one year; Procurement appropriations for three years; and Construction funds have a five-year period of availability. If funds are not obligated during their period of availability, they expire and are unavailable for new obligations (e.g., new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (e.g., to pay for a price increase following an in-scope change to an existing contract).

The "bona fide needs rule." This rule provides that funds are available only to satisfy requirements that arise during their period of availability, and will affect which fiscal year appropriation you will use to acquire supplies and services. *See* 31 U.S.C. § 1502(a).

Supplies. The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for computers needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for computers that are not needed until the next fiscal year. Year end spending for computers that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a current need is documented. Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. *See* Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8. In any event, "stockpiling" items is prohibited. *See* Mr. H.V. Higley, B-134277, Dec. 18, 1957 (unpub.).

Services. Normally, severable services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services, and vehicle/equipment maintenance are examples of recurring services considered severable. Use current year funds for recurring services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits funding a contract (or other agreement) for severable services using an appropriation current when the contract is executed, even if some services will be performed in the subsequent fiscal year. Conversely, nonseverable services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those which contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with appropriations current when the contract (or agreement) is executed. *See* DFAS-IN 37-1, ch. 8.

AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

The Antideficiency Act (31 U.S.C. §§ 1341(a), 1342, & 1517(a)) prohibits any government officer or employee from:

(1) Making or authorizing an expenditure or obligation in advance of or in excess of an appropriation. 31 U.S.C. § 1341.

(2) Making or authorizing an expenditure or incurring an obligation in excess of a formal subdivision of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517.

(3) Accepting voluntary services, unless authorized by law. 31 U.S.C. § 1342.

Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by higher headquarters. Although overobligation of an installation O&M account normally does not trigger a reportable Antideficiency Act (ADA) violation, an overobligation locally may lead to a breach of a formal O&M subdivision at the Major Command level. *See* 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. 1517; DFAS-IN 37-1, ch. 4. Similarly, Purpose section, above, overobligation of a statutory limit, e.g., the $500,000 O&M threshold for construction, may lead to an ADA violation.

Regulations require "flash reporting" of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14; DFAS-IN 37-1, ch. 4. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through OSD and the President to Congress also is required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include:

(1) Without statutory authority, obligating (e.g., awarding a contract) current year funds for the bona fide needs of a subsequent fiscal year. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels.

(2) Exceeding a statutory limit (e.g., funding a construction project in excess of $500,000 with O&M; acquiring investment items with O&M funds).

(3) Obligating funds for purposes prohibited by annual or permanent legislation.

(4) Obligating funds for a purpose for which Congress has not appropriated funds, e.g., personal expenses where there is no regulatory or case law support for the purchase)

CONCLUSION

Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time, and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies, and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on judge advocates for fiscal advice. Active participation by judge advocates in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly. Those found responsible for funding violations will face adverse personnel actions and possibly criminal sanctions.